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Supreme Court of the United States

OCTOBER TERM, 1948

No. 628

COMMERCE COMPANY, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit, and

BRIEF IN SUPPORT THEREOF

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ALPHA LAW BRIEF CO., HOUSTON

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To the United States Court of Appeals for the Fifth Circuit

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

Your Petitioner respectfully shows:

Summary Statement of the Matter Involved

This is a civil action brought in the District Court of the United States for the Southern District of Texas by Commerce Company, Petitioner, against United States of America, Respondent, for the recovery of Federal Income Taxes paid for the taxable period January 1 through December 31, 1938, in the amount of $2,262.45 and for the taxable period July 1, 1938, through May 31, 1939, in the amount of $1,713.38, as shown by the allegations of Petitioner's Complaint (R. 3 to 12).

The facts were stipulated (R. 14 to 33).

The Findings of Fact and Conclusions of Law, as amended (R. 34 to 37), fairly sets forth the issues involved, and judgment was rendered in favor of Respondent denying any recovery of taxes by Petitioner.

An appeal from said judgment was taken by Petitioner to the United States Court of Appeals, Fifth Circuit, which affirmed the judgment of the Trial Court.

The question involved on said appeal was whether in determining the basis of two buildings as at January 1, 1938, for depreciation purposes, the smaller depreciation determined by conference agreement in 1936 to be the proper deductions beginning with the construction of the two buildings in the profit year 1929, and extending through the two following profit years 1930 and 1931, should be deducted from basis for each of the loss years following 1931 and for which returns were filed prior to the conference agreement in 1936, or whether the larger depreciation shown on returns for such intervening loss years and based on Petitioner's original estimate (subsequently retroactively revised by the 1936 conference agreement), should be deducted. The United States Court of Appeals, Fifth Circuit, decided that question adversely to Petitioner (R. 43 to 50).

Jurisdictional Statement

It is contended that the Supreme Court has jurisdiction to review the judgment here in question under the provisions of Title 28, U. S. C., Section 2101, on the grounds that the Circuit Court has rendered a decision in conflict with the decision of another Circuit Court of Appeals on the same matter, and that the Circuit Court has decided an important question of federal law which has not been, but

should be settled by this Court. The judgment of the Circuit Court of Appeals was rendered December 7, 1948.

Question Presented

The question herein presented is whether under the Revenue Act of 1938 the Government of the United States of America is authorized to adjust depreciation rates for years in which a taxpayer has a net profit, without consistently adjusting depreciation rates for intervening (not prior) years in which a taxpayer has a net loss.

Reasons Relied on for the Allowance of the Writ

The United States Court of Appeals, Fifth Circuit, has decided an important question of federal law directly contrary to all other decisions on the identical point, and has rendered a decision in conflict with the decision of PITTSBURGH BREWING COMPANY v. COMMISSIONER OF INTERNAL REVENUE, 107 F. (2d) 155, decided by the Circuit Court of Appeals for the Third on the same matter, and that the Circuit Court has decided an important question of federal law which has not been, but should be, settled by this Court.

WHEREFORE, your Petitioner prays that a Writ of Certiorari issue under the seal of this Court directed to the United States Court of Appeals for the Fifth Circuit commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Circuit Court had in the case numbered and entitled on its docket No. 12357, Commerce Company, Appellant, v. United States of America, Appellee, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States, and that

the judgment herein of said Circuit Court be reversed by the Court and for such further relief as to this Court may seem proper.

Dated March 1, 1949.

COMMERCE COMPANY,

By_____

BEN CONNALLY,
Counsel for Petitioner

Supreme Court of the United States

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COMMERCE COMPANY, *Petitioner*,

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UNITED STATES OF AMERICA, *Respondent*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinion of the Court Below

The opinion of the Court below is shown on pages 43 to 50 of the Record.

Jurisdiction

The date of the judgment of the Circuit Court of Appeals is December 7, 1948. The jurisdictional grounds are stated in the Petition for Writ of Error, and are adopted and made a part of this brief.

Statement of the Case

The statement contained in the Petition for Writ of Certiorari is adopted and made a part of this brief.

Specification of Error

The Circuit Court of Appeals erroneously applied the case of VIRGINIAN HOTEL CORPORATION v. HELVERING, 319 U.S. 523, which concerned a prospective revision of depreciation rates, to deny recovery of Petitioner in the present case, which concerns a revision of estimated depreciable life applied retroactively by the Government to the very year of construction, and following profit years, without adjusting intervening loss years.

Argument

Point A

The Circuit Court of Appeals erroneously applied the case of *Virginian Hotel Corporation v. Helvering*, 319 U.S. 523, which concerned a prospective revision of depreciation rates to deny recovery of Petitioner in the present case, which concerns a revision of estimated depreciable life applied retroactively by the Government to the very year of construction, and following profit years, without adjusting intervening loss years.

In applying the case of VIRGINIAN HOTEL CORPORATION v. HELVERING, 319 U.S. 523, it must be remembered that the Court was making its decision on a state of facts that included only an original estimate of depreciable life that existed for several years, and then a revision of estimated depreciable life at the end of that time, in which situation it was customary for both Taxpayer and Government to

consider and give effect to the revised estimate only on a prospective basis and not on a retroactive basis.

That decision on those facts cannot in good conscience be applied as precedent in the instant situation where the revision of estimated depreciable life was actually applied retroactively by the Government to the very year of the construction of the building. These revised estimated depreciation rates should be effective from the year of the construction of the building on a prospective basis from that date forward in what is the only fair, just, equitable, consistent and customary manner.

The crux of the matter lies in the construction of the phrase "to the extent allowed (but not less than the amount allowable)" in Section 113(b)(1)(B) of the REVENUE ACT OF 1938, which was the same wording enacted in 1932.

Sometimes we become so enamoured of a definition of a word that we lose sight of the setting in which a statute was enacted, its purpose, the equities of the situation to which it is applied, and all sense of fairness, justice and consistency.

Taxation is a practical matter. The Court finds no difficulty, when the equities of the situation require, in reading into the otherwise plain words of a tax statute various equitable modifications, such as ignoring a transaction or series of transactions coming strictly within the terms of the statutes, if undertaken without business purpose, or with an end result not in accordance with the "spirit" of the law; or lifting a taxpayer out of a mire of statutory words with a "tax-benefit" theory; or allowing a "recoupment" where there is no estoppel, but where, as here, a taxpayer has voluntarily stepped into an unconscionable tax trap.

The word "Allowed" means granted. It is rather an ambiguous word, inasmuch as it may mean different things to different men. What was the intent of the Congressional framers of the statute? It is apparent that their only thought

was that "the government might be barred from collecting additional taxes which would have been payable had the lower rate been used originally", and was not intended to create a new trap for taxpayers.

The present situation has never come before this Court. In the VIRGINIAN HOTEL case the taxpayer had deducted a certain rate in the profit years 1927 to 1930 without adjustment by the Government, and the rate had not been changed until 1938, when the Government revised the rate. All this Court had to decide in that case was whether the revision should apply to years already past.

That is a far cry from the present case. Should a hard and fast definition be followed blindly in all cases? "What is reasonably clear in a particular application is not to be overborne by the simple and familiar dialetic of suggesting doubtful and extreme cases," SANTA CRUZ FRUIT PACKING Co. v. NLRB, 303 U.S. 453. But what about the doubtful and extreme cases, when they actually come before the Court? Of the present situation we may well say with MR. JUSTICE RUTLEDGE in NEW YORK v. U. S., 326 U.S. 572, "Marshall spoke at a time when social complexities did not so clearly reveal as now the practical limitations of a rhetorical absolute."

In addition the Court below refused to follow the case of PITTSBURGH BREWING CO. v. COMMISSIONER OF INTERNAL REVENUE, 107 F. (2d) 155, decided by the Circuit Court of Appeals for the Third Circuit, which case has never been overruled by this Court. Petitioner's facts are like the facts of PITTSBURGH BREWING case as set out in 37 BTA 439. In that case Pittsburgh and the Government agreed in 1932 to allow certain depreciation deductions for 1918 to 1920. In the meantime from 1921 to 1931 Pittsburgh in its loss year returns had taken excessive depreciation computed without taking into account the 1918 to 1920 adjustments. The Court in that case allowed Pittsburgh to adjust its basis

in 1932 by the correct depreciation for the loss years 1921 to 1931 instead of the erroneous figure taken on its returns.

To allow a strained construction of a statute to permit the Government to arbitrarily and capriciously juggle depreciation between profit years and loss years to its benefit and to the taxpayer's disadvantage, is to leave the taxpayer a right without a remedy, to misinterpret the plain intent of Congress, and to condone a miscarriage of justice beyond all equity, fairness and reason.

It is therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing the decision of the Circuit Court of Appeals.

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Of Counsel